

ETHICS, MORALITY AND TRUTH-TELLING

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1. On Truth-Telling

Immanuel Kant: "By a lie, a man... annihilates his dignity as a man." Kant treats lying as an aspect of the Categorical Imperative; "[I]n order to fulfil this version of the Categorical Imperative, I have to treat other people's ends (i.e. what they will for its own sake) as my ends." *Groundwork for the Metaphysics of Morals*.

Francis Bacon, "*What is Truth?*" said jesting Pilate; and would not stay for an answer....[T]ruth, which only doth judge itself, teacheth that the inquiry of truth, which is the love-making or wooing of it, the knowledge of truth, which is the presence of it, and the belief of truth, which is the enjoying of it, is the sovereign good of human nature....

To pass from theological and philosophical truth, to the truth of civil business; it will be acknowledged even by those who practice it not, that clear and round dealing is the honour of man's nature; and that mixture of falsehood is like alloy in coin of gold or silver, which may make the metal work the better, but it embaseth it. For these winding and crooked courses are the goings of a serpent; which goeth basely upon the belly, and not upon the feet. There is no vice that doth so cover a man with shame as to found false and perfidious." "*Of Truth*."

St. Augustine: Here a most difficult and complex issue arises which I once dealt with in a large book, in response to the urgent question whether it is ever the duty of a righteous man to lie. Some go so far as to contend that in cases concerning the worship of God or even the nature of God, it is sometimes a good and pious deed to speak falsely. It seems to me, however, that every lie is a sin, albeit there is a great difference depending on the intention and the topic of the lie.... *Enchiridion on Faith, Hope and Love*.

Judge to Accused: "Would you like a lawyer to represent you?"

Accused to Judge: "No, your honor. I've decided to tell the truth."

Question: How can you tell when a lawyer is lying?

Answer: His lips are moving.

2. What is Truth?

- A. A woman is asked whether she would like something to drink. She responds, "I do not drink."
- B. A poker player is playing five-card draw. She holds nothing of value. Nonetheless, she tells the dealer, "I will keep these cards."
- C. I am at home. My wife is also at home. A stranger knocks at the door – a very large stranger who appears to be armed. He says "Good evening. I am the Boston Strangler. Is the woman of the house at home tonight?" I reply, "No, she is out of town."

Benjamin Constant: "It is a duty to tell the truth. The notion of duty is inseparable from the notion of right. A duty is what in one being corresponds to the right of another. Where there are no rights there are no duties. To tell the truth then is a duty, but only towards him who has a right to the truth. But no man has a right to truth that injures others." *France*

3. Is Truth Variable?

- D. An attorney has been appointed to represent Dennis, who is charged with the murder of his sister. In the initial interview, Dennis tells counsel that he did commit the murder and provides all the details surrounding the crime. Your independent investigation convinces you that his statement is truthful. He expresses, however, a desire to enter a plea of not guilty. May the lawyer enter such a plea?
- E. An attorney represents Mammoth Corporation in a civil antitrust case. The complaint alleges that Mammoth entered into an agreement to restrain trade. In the course of interviews with company officers, it is plain that the agreement in question was made. Indeed, no one denies the fact of the agreement or that its terms were as alleged in the complaint. Counsel is instructed,] to deny all allegations of the complaint and make the plaintiff prove its case. May the lawyer properly do so?

Richard Wasserstrom: "...I do believe that the amoral behavior of the *criminal* defense lawyer is justifiable. But I think that [justification] depends at least as much upon the special needs of an accused as upon any more general defense of a lawyer's role-differentiated behavior.... Because a deprivation of liberty is so serious, because the prosecution resources of the state are so vast...it is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused – without regard, so to speak, for the merits. This coupled with the fact that it is an adversarial proceeding succeeds, I think, in justifying the amorality of the criminal defense counsel.

But this does not, however, justify a comparable perspective on the part of lawyers generally...

[A]ll of the arguments that support the role-differentiated amorality of the lawyer on institutional grounds can succeed only if the enormous degree of trust and confidence in the institutions themselves is itself justified... To the degree to which the institutional rules and practices are unjust, unwise, or undesirable, to that same degree is the case for role differentiated behavior of the lawyer weakened if not destroyed." *"Lawyers as Professionals: Some Moral issues,"* 5 Human Rights 1.

A.B.A. Model Rules of Professional Conduct, Rule 3.3(a): **A lawyer shall not knowingly: Make a false statement of fact to a tribunal....**

Federal Rules of Criminal procedure, Rule 11(a)(1): *In General.* A defendant may plead guilty, not guilty, or (with the court's consent) nolo contendere.

Federal Rules of Criminal Procedure, Rule 11(b)(1): Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court.

Federal Rules of Civil Procedure, Rule 11(b): Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances...

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

4 Is Truth An Affirmative Duty?

F. Whiteside was charged with murder for the fatal stabbing of Love in Love's apartment. Whiteside consistently told his court-appointed lawyer that he stabbed Love because he thought Love was pulling a pistol from under a pillow, but that he had not seen a gun in Love's hand. None of Whiteside's companions who were present during the stabbing had seen a gun. Shortly before trial, Whiteside asserted for the first time that he

had seen something “metallic” in Love’s hand. When pressed by counsel concerning the change of story, Whiteside said, “If I don’t say I saw a gun, I’m dead. When Whiteside insisted he would testify he saw “something metallic,” counsel stated that he thought the story was perjury and would not allow it and, if the accused tried to testify to the later story, he would withdraw and reveal the perjury. At trial, Whiteside testified as originally contemplated, admitting on cross-examination that he had actually seen a gun. After conviction, he claimed a denial of effective assistance of counsel.

ABA Model Code of Professional Responsibility, DR 7-102(A): In his representation of a client, A lawyer shall not.... (4) Knowingly use perjured testimony or false testimony.

A.B.A. Model Rule of Professional Conduct 3.3 (b)... A lawyer who ... knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct relating to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

G. Despite the lawyer’s advice, Whiteside testified as he proposed to do. What, if anything, should the lawyer do?

A.B.A. Model Rules of Professional Responsibility, DR 7-102(B): A lawyer who receives information clearly establishing that:

(1) The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

A.B.A. Model Rules of Professional Conduct, Rule 3.3(a): A lawyer shall not knowingly:

(1) Make a false statement of fact to a tribunal or fail to correct a false statement of material fact previously made to the tribunal by the lawyer...

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

H. A lawyer represents both the named defendant and several other clients with whom the defendant was associated in the

civil antitrust action described above. Opposing counsel, during discovery, asks for disclosure of the names of any other clients whose interests are implicated in the litigation. The lawyer declines to do so, citing cases holding that client names are privileged and therefore not subject to discovery. The case law on which the lawyer relies deals only with disclosure of client names when the clients will be subject to criminal prosecution once identified and, moreover, legal decisions on application of the privilege even in that setting are divided. Was it wrong to state the law treats the requested information as privileged?

A.B.A. Model Rules of Professional Conduct, Rule 3.3(a). A lawyer shall not knowingly...

(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer believes is false....

© The duties described in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

5. Perverting the Truth?

I. Defense counsel represents Dr. Crippen, charged with murder. Crippen has told counsel that he committed the crime with which he is charged, but wishes to force the state to prove the case against him. Part of that case is the testimony of William Sly, a witness who will testify that he saw the accused shoot the victim on the night in question. Counsel has learned the following about Mr. Sly and his testimony:

1. He told another person, X, that he saw the shooting and is sure that the killer was Dr. Crippen. The prosecution may offer that evidence. Should defense counsel object?

2. Mr. Sly's eyesight is not very good, and the killing occurred at night on a dimly-lit street. Should counsel seek to establish the weakness of Mr. Sly's eyesight in this case?
3. Seven years ago, Mr. Sly was convicted of the crime of embezzlement and sentenced to six months in prison. Embezzlement is a felony. The conviction occurred in the neighboring state, from which he moved after his time was served. Since then, he has been employed in a position of trust, his prior crime being known only to the person who hired him and not to his associates or friends in the community. Should counsel impeach Mr. Sly on the basis of that conviction

Common dictionary definition: Lie (n): A perversion of truth.

Federal Rules of Evidence, Rule 609(b): For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to [Rule 403](#), if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted...; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.